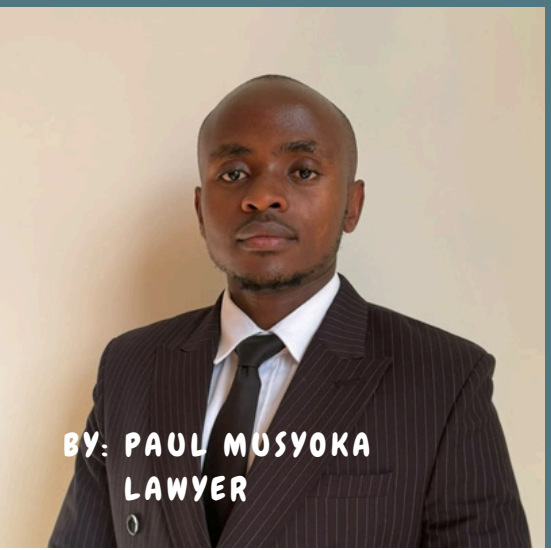
YEARS IN THE SHADOW OF A CONTRACT: THE LONG WAIT OF KENYA'S CASUAL WORKERS



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There is a particular kind of injustice that wears the disguise of paperwork; “a worker who has served for twenty years, yet whose file still reads "casual."

It is this quiet contradiction that the Court of Appeal at Nyeri confronted in ***Kenya County Government Workers' Union v Embu County Government & another (Civil Appeal 178 of 2020) [2026] KECA 1481 (KLR),*** a judgment delivered on **24th July 2026** that offers one of the clearest recent restatements of how Kenyan courts must look past labels and into the lived substance of an employment relationship.

The Dispute

The appellant, a trade union representing 256 employees of Embu County, had petitioned the Employment and Labour Relations Court (ELRC) on behalf of members who were originally engaged by the national government's Ministry of Health and later inherited by the county following devolution under the 2010 Constitution. These workers had been hired on short fixed-term contracts some three months, six months, sometimes a year yet many had performed duties of a permanent nature for periods stretching well beyond a decade, in some cases over twenty years.

When their contracts lapsed, the county neither confirmed nor renewed their status in writing, leaving them in what the Court repeatedly described as "a state of anxiety and confusion." The union sought a declaration of unfair labour practices under Article 41 of the Constitution, conversion of the members' status to permanent and pensionable terms under section 37 of the Employment Act, and a finding of discrimination under Article 27 and section 5 of the Act, pointing to comparably placed employees who had been absorbed into permanent positions while the appellant's members were passed over.

The Appellant asserted that in 2011, the National Government, through the Ministry of Health, recruited new casual employees through a program known as the Economic Stimulus Program, which was established before the promulgation of the new Constitution. Several casual health employees under this program were deployed to Embu Health Facilities for a 3-year contractual period, after which they were all absorbed into permanent and pensionable employment. This was done without regard to the appellant's members, who remain long-serving casual health employees, despite their applications for the same positions and their comparable qualifications, skills, and experience, thereby constituting discrimination.

The Appellant further alleged that the Embu County Government invited the appellant's members under the Hospital Management Board to participate in a re-vetting exercise aimed at assessing their suitability for work and facilitating the renewal of their contracts. In 2018, the County Government began issuing recommendation letters to the appellant's members, indicating that they were recommended for employment elsewhere while still in their current positions. These arbitrary actions left the appellant's members in a state of uncertainty and apprehension, believing that the respondents intended to constructively terminate their services. The trial ELRC dismissed the petition outright, holding it "misplaced" and "a complete waste of judicial resources," and suggesting the union ought to have pursued the matter through shop-floor representative negotiation rather than litigation.

The Court of Appeal's Reasoning

Sitting as a first appellate court with a duty to re-evaluate the evidence afresh, the Court of Appeal took a markedly different view. It examined the actual conduct between the parties rather than the words used in employment letters, noting that several members had been designated "casual" in their letters of engagement yet had gone on to earn monthly salaries and to serve continuously for periods far exceeding the one-month threshold in **section 37 of the Employment Act,** a provision that automatically converts a casual arrangement into a term contract once continuous service crosses that threshold.

Relying on its own precedents, including ***Kenyatta University v Maina and Nanyuki Water & Sewage Company Limited v Benson Mwiti Ntiritu & 4 Others,*** the Court reaffirmed that the signing of contracts of 3 months which were renewed on expiry is a roundabout way of avoiding the provisions of the law on casual employment. Further the Court also adopted the ***Kenyatta University V Maina*** trial court reasoning where the learned Judge was of the opinion that where there is no contention that a Petitioner served the Respondent continuously for months on end, which cumulatively comes to over many years, the nature of the employment relationship between the petitioner and respondent is therefore not casual or temporary but permanent and pensionable and which he declared as per **section 37(1) of the Employment Act 2007.**

The Appellate court therefore concluded that the appellant's members were not casual employees, nor were they on fixed contract as assumed by the Respondent, who engaged them for a long period of time, extended the contracts at its whims. The Court firmly found that the long and continuous service entitled the appellant's members to statutory protection. It further unequivocally stated that the Employment Act was precisely put in place to protect employees who often have no voice against the 'big brother' from unfair and poor labour practices that dogged the public and private service for decades.

On this basis, the Court found that the trial judge had erred by failing to interrogate the true nature of the engagement and by treating the union's constitutional claims as matters better suited to shop-floor bargaining, when in fact violations **of Article 41** fall squarely within the ELRC's constitutional jurisdiction and cannot be delegated to informal workplace representatives. However, on the separate claim of discrimination under **Article 27,** the Court agreed with the trial court that the appellant had not discharged its evidentiary burden with payslips or comparative data, even though the burden of disproving discrimination technically rests with the employer under **section 5(6)** once an allegation is raised.

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Impact on Employment Practice

The judgment carries several practical implications. Firstly, it reinforces that public and private employers alike cannot rely on the label "casual" or "fixed-term" in a contract to shield themselves from statutory obligations if the actual working pattern such as continuous, long-term, monthly-paid service, tell a different story and that **section 37** operates automatically, by operation of law, once its thresholds are met.

Secondly, it signals that constitutional claims of unfair labour practice under Article 41 must be heard on their merits by the ELRC and cannot be dismissed on the basis that a union should have pursued informal negotiation first.

Thirdly, it is a caution to county governments and other public institutions, which the Court noted are expected to protect its citizens and to work within the law, that prolonged use of rolling short-term contracts for what is effectively permanent work invites judicial condemnation and orders of regularization.

At the same time, the outcome on the discrimination claim is a reminder that even meritorious grievances require an evidentiary foundation and that general assertions of unequal treatment, without payroll or comparator evidence, will not succeed even where the burden of proof formally shifts to the employer.

Taken together, the case strengthens protections for Kenya's long-serving casual and quasi-permanent workforce, while underscoring that unions and claimants must still build their discrimination claims on concrete proof.